IN THE HIGH COURT OF JUDICATURE AT MADRAS

Dated: 23..4..2007

Coram:

The Honourable Mr. Justice K.CHANDRU

W.P. No.12293 of 2007
and
M.P.No.1 of 2007

Major Uday Nangia
Officer's Mess
Officers Training Academy
St. Thomas Mount
Chennai .... Petitioner

:versus:

1. The Assistant Adjutant Quarter Master General
O.T.A. St. Thomas Mount
Chennai - 16

2. The General Court Martial
Rep. by its Presiding Officer
Officers' Training Academy
St. Thomas Mount
Chennai-16 .... Respondents

Petition under Art.226 of the Constitution of India, praying for a Writ of Certiorarified Manadamus by calling for the entire records comprised on the file of the respondent 1 and to quash order made in 441/1/UN/A dated 26.3.2007 and consequentially to direct the respondent 1 to accept petitioner's list of Defence witnesses submitted by him on 24.3.2007 and issue summons to them and to furnish the Medical records on the file of the Military Hospital, Chennai and Command Hospital, Air force, Bangalore pertaining to the period between (i) 29.01.2003 and 07.02.2003 (ii) between 08.3.2003 and 03.4.2003 (iii) between 04.3.2004 and 24.5.2004 (iv) 05.10.2004 and 16.02.2005 (v) 17.9.2005 and 27.9.2005 to examine the Defense Doctors.

For Petitioner :: Mr. Rupert J. Barnabas
For Respondents :: Mr. D. Sreenivasan
A.G.C.S.C. (for R1)

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ORDER

The petitioner in the present writ petition seeks for the prayer to quash the order dated 26.3.2007 passed by the first respondent wherein and by which he was told that the list of witnesses given by him will not be called as he had not availed Rule 34 of the Army Rules, 1954 [for short, 'Rules'] at the earlier point of time.

2. The case against the petitioner was taken by the second respondent General Court Martial [for short, 'GCM'] exercising option under Section 125 of the Army Act, 1950, which reads as under:

Section 125. Choice between criminal court and court-martial

> "When a criminal court and a court-martial have each jurisdiction in respect of an offence, it shall be in the discretion of the officer commanding the army, army corps, division or independent brigade in which the accused person is serving or such other officer as may be prescribed to decide before which court the proceedings shall be instituted, and, if that officer decides that they should be instituted before a court-martial, to direct that the accused person shall be detained in the military custody."

3. The facts of the case as seen from the records are as follows:

The petitioner is a Major in the Indian Army. His deceased wife (Capt. Madhura Joshi) at the relevant time was working as an Instructor in the Officers' Training Academy (OTA), Chennai. On 23.12.2002 petitioner's wife sustained severe burn injuries all over her body when she was in her house. The petitioner also suffered burn injuries. According to the petitioner, the incident was on account of his wife's attempt to commit suicide. Both of them were taken to the Military Hospital by the neighbours and from there, they were shifted to Kilpauk Medical College Hospital. In respect of the said incident, a complaint was given to the Inspector of Police and the same was registered in Crime No.774 of 2002 on 23.12.2002 and the First Information Report was sent to the Judicial Magistrate on 24.12.2002. On 24.12.2002, dying declaration of the petitioner's wife as well as the petitioner was recorded. Petitioner's wife succumbed to the severe burn injuries on 24.12.2002. On 26.12.2002 the Revenue

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Divisional Officer, Chinglepet conducted an enquiry and recorded the statements of the relatives of the petitioner's wife. The jurisdictional police continued the investigation and recorded the statements of witnesses, etc. as required under the Code of Criminal Procedure. In the mean time, the case registered under Sec.285 IPC was altered to one under Sec.306 and 498-A I.P.C. The Commanding Officer, O.T.A. by his letter dated 20.7.2004 addressed the Judicial Magistrate to submit the case files and accordingly the case papers were sent to the Commanding Officer, O.T.A. On receipt of the case file, the first respondent, exercising his powers under Sec.109 of the Army Act, by order dated 25.7.2004, convened a General Court Martial consisting of seven Army Officers as Members to try the petitioner for the offences alleged against him. Subsequently, by order dated 02.8.2005, the first respondent modified the the composition of the said General Court Martial with five Army Officers as Members.

4. Thereafter, the petitioner challenged the taking over of the criminal case by the respondent by way of writ proceedings in W.P.No.35061 of 2005. The said writ petition was dismissed by an order dated 27.3.2006 by a learned Judge of this Court. Aggrieved by the same, the petitioner filed a writ appeal being W.A. No.407 of 2006. Before the Division Bench, the petitioner sought for withdrawal of the very writ petition itself reserving his right to challenge the final order, if any passed, on the proceedings initiated by the respondents. The Division Bench, by an order dated 12.12.2006, granted permission and allowed the petitioner to withdraw the writ petition and the order passed by this Court was also recalled. However, while doing so, the Bench reserved the petitioner's right to challenge any infirmity in the proceedings only at the end of the trial. The permission given by the Bench as found in the order of the Division Bench in paragraph 4 reads as follows:

Para 4: "In view of the stand taken by the respondents, as requested by the learned counsel for the appellant, on the instructions of the appellant, is allowed to withdraw this appeal as well as the writ petition with liberty to raise all the issues before the appropriate authority at the appropriate stage or before the appropriate forum (Court of Law), if the appellant is convicted. The appellant will co-operate in the General Court Martial proceedings and may raise all these issues. The authorities are expected to conclude the proceedings on an early date, if possible on a day-to-day basis between 10.00 a.m. and 5.00 p.m.,

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as suggested by the counsel for the respondents."

[Emphasis added]

5. Notwithstanding that order, the petitioner had filed a list of defence witnesses containing as many as 28 names by his letter dated 24.3.2007. When this was refused, the petitioner has come before this Court and sought for a direction. After some preliminary submission, this Court directed the petitioner to shortlist the 28 names and to confine his case only to six names found in the list, which may have some relevance to the defence taken by him and the six names are as follows:

1. Gp Capt AK Behl, Plastic Surgeon at Air Force Command Hospital, Bangalore in 2002-2003.

2. Wg Cdr T Roy, Plastic Surgeon at Air Force Command Hospital, Bangalore in 2003-2005.

3. JC-818103H Sub SC Dey of CMP who visited scene of occurrence on 23 Dec. 2002, took statements and made a report
4. Head Constable 1713 C Jayakumar of Police
5. Selvi, Maid servant
6. Mr.Murthy, Tahsildar Egmore - Nungambakkam who conducted RDO inquiry and took statements on 26 Dec. 2002.

6. I have heard Mr.Rupert J. Barnabas, learned counsel appearing for the petitioner and Mr.D.Sreenivasan, learned Additional Central Government Standing Counsel representing the first respondent and have perused the records.

7. Mr.D.Sreenivasan, learned Additional Central Government Standing Counsel representing the first respondent, on instructions, submitted that even in respect of the six names, the first two Doctors are under the control of Air Force and, therefore, he will not be in a position to bring those witnesses and with reference to the third name, the learned counsel stated that the statement and reports were filed and marked and, therefore, the evidence of S.C. Dey may not be necessary.

8. However, Mr. Rupert J. Barnabas, learned counsel appearing for the petitioner, stated that certain materials are planted during inspection, and therefore, they are all required.

9. With reference to the fourth name, the learned ACGSC stated that already, Inspector of Police has been examined and, therefore, the examination of Head Constable is not necessary. With reference to the fifth name Selvi, learned counsel stated

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that in the earlier address, the said witness was not found and if the correct address of the witness is given, summons may be sent. But with reference to the sixth name, he stated that the RDO enquiry is not relevant to this case. Even otherwise, the statements recorded by the RDO can be summoned.

10. This, he submitted without prejudice to the preliminary objection regarding the maintainability of the writ petition and the binding nature of the earlier order of the Division Bench. He also drew the attention of this Court to Sections 153 and 164 of the Army Act, which read as follows:

> Section 153. Finding and sentence not valid, unless confirmed
>
> "No finding or sentence of a general, district or summary general, court-martial shall be valid except so far as it may be confirmed as provided by this Act."
>
> Section 164.Remedy against order, finding or sentence of court-martial
>
> "(1) Any person subject to this Act who considers himself aggrieved by any order passed by any court-martial may present a petition to the officer or authority empowered to confirm any finding or sentence of such court-martial, and the confirming authority may take such steps as may be considered necessary to satisfy itself as to the correctness, legality or propriety of the order passed or as to the regularity of any proceeding to which the order relates.
>
> (2) Any person subject to this Act who considers himself aggrieved by a finding or sentence of any court-martial which has been confirmed, may present a petition to the Central Government, [the Chief of the Army Staff] or any prescribed officer superior in command to the one who confirmed such finding or sentence, and the Central Government, [the Chief of the Army Staff] or other officer, as the case may be, may pass such orders thereon as it or he thinks fit."

Therefore, he stated that the entertainment of the writ petition may be premature and the petitioner's rights are adequately protected by the Army Act.

11. He also drew the attention of this Court to the order of the Division Bench referred to above and stated that the attempt of the petitioner is only to drag on the proceedings and

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it is a clear abuse of process of Court and this Court cannot grant any order in view of the direction of the Division Bench.

12. Per contra, the learned counsel appearing for the petitioner submitted that since the petitioner is facing a GCM, which is akin to criminal trial, he should be given reasonable opportunities. The order of the Division Bench does not stand in the way of granting relief. Examination of the witnesses is mandatory and when the accused exercised that option, the same must be given. The learned counsel drew the attention of the relevant provisions of the Army Act and particularly, to Section 135 of the Army Act as well as Rules 34, 136 and 137 of the Army Rules, which read as follows:

Section 135. Summoning witnesses

"(1) The convening officer, the presiding officer of a court-martial, [or courts of inquiry], the judge-advocate or the commanding officer of the accused person may, by summons under his hand, require the attendance, at a time and place to be mentioned in the summons, of any person either to give evidence or to produce any document or other thing.

(2) In the case of witness amenable to military authority, the summons shall be sent to his commanding officer, and such officer shall serve it upon him accordingly.

(3) In the case of any other witness, the summons shall be sent to the magistrate within whose jurisdiction he may be or reside, and such magistrate shall give effect to the summons as if the witness were required in the court of such magistrate.

(4) When a witness is required to produce any particular document or other thing in his possession or power, the summons shall describe it with reasonable precision."

Rule 34. Warning of accused for trial

"(1) The accused before he is arraigned shall be informed by an officer of every charge for which he is to be tried and also that, on his

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giving the names of witnesses or whom he desires to call in his defence, reasonable steps will be taken for procuring their attendance, and those steps shall be taken accordingly.

The interval between his being so informed and his arraignment shall not be less than ninety-six hours or where the accused person is on active service less than twenty-four hours.

(2) The officer at the time of so informing the accused shall give him a copy of the charge-sheet and shall if necessary, read and explain to him the charges brought against him. If the accused desires to have it in a language which he understands, a translation thereof shall also be given to him.

(3) The officer shall also deliver to the accused a list of the names, rank and corps (if any), of the officers who are to form the court, and where officers in waiting are named, also of those officers in courts-martial other than summary courts-martial.

(4) If it appears to the court that the accused is liable to be prejudiced at his trial by any non-compliance with this rule, the court shall take steps and, if necessary, adjourn to avoid the accused being so prejudiced."

Rule 136. List of witnesses of accused

"The accused shall not be required to give to the prosecutor or court a list of the witnesses whom he intends to call, but it shall rest with the accused alone to secure the attendance of any witness whose evidence is not contained in the summary and for whose attendance the accused has not requested steps to be taken as provided by sub-rule (1) of rule 3."

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Rule 137. Procuring attendance of witnesses

(1) In the case of trial by general or district court-martial, the commanding officer of the accused, the convening officer or, after the assembly of the court, the presiding officer, shall take proper steps to procure the attendance

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of the witnesses whom the prosecutor or accused desires to call, and whose attendance can reasonably be procured, but the person requiring the attendance of a witness may be required to undertake to defray the cost (if any) of their attendance.

(2) The court shall, in the case of trials by summary court-martial, take proper steps to procure the attendance of the witnesses whom the accused desires to call and whose attendance can reasonably be procured, but the accused may be required to undertake to defray the cost (if any) of their attendance."

13. Learned counsel for the petitioner also stated that a combined reading of the Section and the relevant Rules will show that the petitioner has a right to bring the defence witnesses and even though the petitioner had not exercised the option in terms of Rule 34 of the Rules, he always can exercise the option under Rules 136 and 137 of the Rules. According to the learned counsel, Rule 34(1) of the Rules requiring the list of witnesses to be given even before arraignment, which is illegal as the witnesses are likely to be tampered with and the Rule is also unconstitutional and contrary to the principles behind the Code of Criminal Procedure and it also does not guarantee a fair trial. However, he fairly submitted that he is not challenging the constitutional validity of the said Rule and he will rest contend with an harmonious interpretation of Rule 34 and 136 of the Army Rules.

14. Mr.D.Sreenivasan, learned ACGSC opposed any intervention at this stage by stating that one of the member of constituted GCM is to retire on 30.4.2007 and the entire exercise will go waste. The prosecution witnesses have been examined and the petitioner has cross-examined most of them and only in some cases, he has deferred. He also stated that the names of the witnesses are already known to the petitioner and he has not exercised the option available under Rule 34 of the Rules. Even under Rule 136 of the Rules, there is a discretion vested on the GCM to call the witness or not. He also stated that Rule 137(2) of the Rules relate to summary Court Martial.

15. In the light of the above, it is to be seen whether the petitioner's request can be granted, more particularly, with the altered list of six names, which he had agreed to examine before this Court. Had it not been for the binding order of the Division Bench, this Court would have certainly exercised discretion in the matter of examination of defence

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witness and out of the six names shortlisted by the petitioner, a few witnesses could have been directed to be examined, especially Selvi, the Maid servant, who is supposed to be an eye-witness, would have been a relevant witness. But the petitioner with his conduct of coming before this Court on a jurisdictional point, got a direction from the Division Bench and in that, the Division Bench has clearly stated that all the issues can be raised if the petitioner is convicted. There was a further direction to conclude the trial on day-to-day basis. Further, the learned counsel for the petitioner submits that while the order of the Division Bench relates to the jurisdictional issue, the present cause of action is entirely different.

16. I am unable to agree with the said submission as this Court cannot go behind the observations made by the Division Bench and then hold that notwithstanding the direction of the Division Bench, the trial should be balked at every stage and, therefore, entertainment of the writ petition is highly doubtful. At this stage, one cannot presume that the verdict may go against the petitioner. That is why, the Division Bench gave the liberty to the petitioner to challenge the jurisdictional issues in case the petitioner is convicted by GCM. Further, as rightly contended by the learned counsel for the respondents, the findings recorded by the GCM will have to be confirmed by the higher authorities under Section 153 of the Army Act and also a remedy is available to the highest authority under Section 164 of the Army Act. Therefore, it is not as if the petitioner is in a helpless situation to seek remedies before the forums available under the Army Act. In view of the clear direction of the Division Bench referred to above and also the further safeguards provided under Sections 153 and 164 of the Army Act, this Court is unable to entertain the writ petition.

17. In the light of the above, the writ petition fails and the same shall stand dismissed. Interim order granted on 20.4.2007 stands vacated. No costs. Connected Miscellaneous Petition is closed.

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Sub Asst.Registrar

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To

1. The Assistant Adjutant Quarter Master General
O.T.A. St. Thomas Mount
Chennai – 16

2. The General Court Martial
Rep. by its Presiding Officer
Officers' Training Academy
St. Thomas Mount
Chennai-16

+1cc to Mr.Rupert Barnabas, Advocate Sr 27050
+1cc to MR.D.Sreenivasan, Advocate Sr 26979

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